Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

William L. Lutz, Esquire
Counsel of Record
Hugh T. Brower
Martin, Lutz & Brower, P.C.
2100 N. Main, Ste. 3
P. O. Drawer 1837
Las Cruces, New Mexico
88004-1837
(505) 526-2449

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED FOR REVIEW

The question presented by this petition are:

1. An investigator for a state District Attorney's Office, who is a certified law enforcement officer, should not have absolute prosecutorial immunity under 42 U.S.C. §1983 for material false statements under oath in securing an arrest warrant.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Susan Lynn Roberts, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 6, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix App. 1 through 16 to this petition and is published at 104 F.3d 316 (10th Cir. 1997).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on January 6, 1997. The opinion was issued as a mandate on January 6, 1997. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires an interpretation in applying 42 U.S.C. §1983 which provides as follows:

> Every person who, under color of any statute, ordinances, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Suit was commenced, pursuant to 42 U.S.C. §1983, by Susan Lynn Roberts to the United States District Court for the District of New Mexico, alleging a violation of her civil rights by Charles Timothy Kling. The basis for federal jurisdiction in the district court was 28 U.S.C. §1343(3). The district court entered summary judgment holding Charles Timothy Kling was immune from suit under 42 U.S.C. §1983. Susan Lynn Roberts appealed to the United States Court of Appeals for the Tenth Circuit which held that Charles Timothy Kling was absolutely immune since he worked for the District Attorney's Office of Dona Ana County, New Mexico.

B. The Facts Material to the Questions Presented.

Susan Lynn Roberts had summer visitation rights with her two children. In the summer of 1992, the children were delivered to her in El Paso, Texas. She took the

children to the State of Oregon. In August, 1992, she and her ex-husband disagreed as to the date the children were to be returned. Susan Lynn Roberts' ex-husband lived in New Mexico near the Texas state line. The divorce had been granted in New Mexico. Susan Lynn Roberts did not return the children to her ex-husband by the date he contended they were to be returned. Charles Timothy Kling, a certified law enforcement officer who worked as an investigator for the District Attorney's Office of Dona Ana County, was requested by the District Attorney to investigate a complaint made by Susan Lynn Robert's ex-husband and his attorney. After an investigation, Charles Timothy Kling was the affiant to a complaint in State Magistrate Court in Dona Ana County, New Mexico to secure an arrest warrant. In this complaint, Charles Timothy Kling stated under oath that the crime, which was the subject of his affidavit, had occurred in New Mexico on or about August 17, 1992.

At the time of the making of this affidavit, Charles Timothy Kling knew that Susan Lynn Roberts had been in the State of Oregon on or about this date and was not in the State of New Mexico. Also, at the time of the making of this affidavit, Kling knew that there was a dispute as to the time the children were supposed to be returned to the ex-husband. On the face of the decree in the divorce, the children did not have to be returned until after August 17, 1992. Later, in 1992, the judge granting the divorce interpreted the decree that the children should have been returned around August 17, 1992.

As a result of this false complaint, a federal fugitive warrant was secured by the FBI against Susan Lynn Roberts falsely claiming that she had fled the State of

New Mexico to avoid prosecution. She had not been in New Mexico in August and had not fled New Mexico. She was arrested on the federal warrant and the New Mexico state warrant and jailed in Oregon on or about November 24, 1992. Shortly after the birth of her youngest child, Susan Lynn Roberts was transported to the State of New Mexico on these charges, and jailed again for approximately a month.

Her public defender filed a motion to dismiss since no crime had taken place in New Mexico. The state district judge in the criminal proceeding agreed that no crime had occurred in New Mexico and dismissed the case. The State of New Mexico appealed this decision to the New Mexico Court of Appeals. The New Mexico Court of Appeals in an unpublished decision summarily affirmed the decision of the New Mexico District Court stating:

> There was no evidence that Mother was in New Mexico when she failed to return the children.

(Unpublished Memorandum Opinion filed November 15, 1993, in the Court of Appeals of the State of New Mexico).

The false factual allegations in the complaint by Charles Timothy Kling, which were also relied upon by the Federal Bureau of Investigation (FBI) in filing the complaint under 18 U.S.C. §1073, were the primary basis of Susan Lynn Roberts' suit below.

REASONS WHY THE WRIT SHOULD BE GRANTED

The question of the extent of absolute immunity of state and federal law enforcement officials has been an issue of disagreement by many courts. This Court has written numerous decisions concerning the issue of qualified immunity and absolute immunity as to both law enforcement officers and attorneys in prosecutor's offices. Traditionally, this Court has held that persons, in performing an investigative function prior to filing of a formal information or indictment, have only qualified immunity. Yet, in this case, the Tenth Circuit held that an investigator, who was a certified law enforcement officer in the State of New Mexico, and who made a material false statement under oath to secure an arrest warrant, had absolute prosecutorial immunity.

The decision of the Tenth Circuit conflicts with numerous decisions of this Court on immunity of state officials under 42 U.S.C. §1983 and federal officers, including *Pierson v. Ray*, 386 U.S. 547 (1967); *Butz v. Economou*, 438 U.S. 478 (1978); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); and *Burns v. Reed*, 500 U.S. 478 (1990).

The Tenth Circuit recognized that there was a conflict in the circuits on this issue. 104 F.3d at 320, Footnote 5. The decision of the Tenth Circuit conflicts with the decision of the Ninth Circuit with *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996) and *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986). In *Fletcher*, the Ninth Circuit held that a prosecutor who prepared an application for an arrest

warrant had only qualified immunity in preparing a declaration in support of an arrest warrant. In *Joseph*, the Sixth Circuit held that investigators for a district attorney's office had only qualified immunity in connection with a search warrant while the prosecutor had absolute immunity. This Court should resolve these conflicts in the circuits and should insure that its decisions above cited are consistently followed by the circuits.

This Court, years ago, recognized that police officers performing an arrest function had only qualified immunity. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). In *Butz v. Economou*, 438 U.S. 478 (1978), the Court dealt with the distinction between absolute and qualified immunity on the liability of federal officials. The Court adopted the rule which generally has been applied in §1983 cases as to liability of state officials. The Court has recognized judges, legislators and prosecutors were given absolute immunity. Other actions of public officials were given qualified immunity.

In such cases as *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that the function the public employee was performing, which gives rise to the claim of liability, determines whether the employee has qualified or absolute immunity. In that case, the attorney general was sued in connection with national security wire taps. The question was whether the attorney general had absolute immunity as a prosecutor or only qualified immunity as a law enforcement officer. In deciding whether officials performing particular functions are entitled to absolute immunity, the Court has generally looked at historical or common law basis for the immunity in question. There was no historical or common law basis

for absolute immunity for officers carrying out tasks essential to national security. Second, the performance of the national security function did not subject the official to the same risk of litigation as did carrying out judicial tasks. Third, officials who were entitled to absolute immunity were generally subject to other checks which helped to prevent abuses in authority from going unaddressed, such as legislators being accountable to their constituents. 472 U.S. at 521-522. None of these criteria applied to the attorney general in connection with the authorization of an illegal wire tap to give rise to absolute immunity.

This Court in *Malley v. Briggs*, 475 U.S. 335 (1986), held that state police officers who request a warrant which causes an unconstitutional arrest are only entitled to qualified immunity under §1983. The defendant in *Malley* was the person who drew up the complaint and was the affiant on the complaint to get an arrest warrant. As a result of this complaint, a judge issued a warrant. The Court held that state officers who seek absolute exemption from personal liability bear the burden of showing public policy requires such an exemption. The defendant argued before this Court that the petitioner should be absolutely immune similar to a complaining witness. This Court noted that a complaining witness was not absolutely immune in common law.

> In *Imbler, supra,* we concluded that at common law "[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution." Id., at 437, 47 L.Ed.2d 128,

> 96 S.Ct. 984. We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue.

at page 279.

This Court stated that a police officer applying for a warrant, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. In conclusion, this Court found,

> In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity.

at page 280.

This decision is in direct conflict with the decision of the Tenth Circuit in this case.

Here, the investigator for the District Attorney's Office was seeking an arrest warrant as an investigator. This was not an information nor an indictment. Kling was a law enforcement officer, not an attorney prosecutor. The mere fact that an assistant district attorney reviewed the affidavit does not change Kling's status from qualified immunity to absolute prosecutorial immunity. Kling knew that Susan Roberts had not been in New Mexico on or about the date alleged in the complaint. Yet, he submitted a sworn complaint and affidavit to secure an arrest warrant that falsely stated that Susan Lynn Roberts' actions had occurred in the State of New Mexico.

This was a fact, which both under New Mexico law and federal law, had to be determined ultimately by a

jury after an information or indictment were filed. Yet, in this case, it is undisputed this allegation is false. Once brought to the attention of the state district court the case was dismissed. The Court of Appeals of the State of New Mexico summarily affirmed the dismissal since no actions of Susan Roberts had taken place in the State of New Mexico.

This is not the situation of a witness at a trial, a witness before a grand jury, or a prosecutor knowingly submitting third-party false testimony at trial, such as occurred in *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Tenth Circuit failed to consider that it is not the office for which one works, but the actual function that one is performing at the time of the actions which give rise to the type of immunity. An attorney, even a prosecutor, who is only giving advice, does not have absolute immunity. Such a prosecutor only has qualified immunity. *See, Burns v. Reed*, 500 U.S. 478 (1991).

The judicial system, in protecting a citizen's rights, must have truthful information given to Magistrates by law enforcement officers to secure search and arrest warrants. An investigator should not have absolute immunity for material false statements. The system is only as good as the information that law enforcement officers provide to the Magistrate. Traditionally, at common law, when false statements were made in connection with a complaint to secure an arrest warrant, there has been liability.

As law enforcement agencies and prosecutorial offices have grown, functions have become blurred. Many district attorney offices have large staffs of investigators who perform a police function of investigating cases.

Kling, in this case, performed such a function. He investigated the facts and submitted an affidavit and sworn criminal complaint to a local Magistrate in Dona Ana County, New Mexico. Under New Mexico law, an indictment or an information is the charging document and must be signed by the district attorney. SCRA 1986, Rule 5-201. The form of criminal complaints are in the New Mexico rules at SCRA 1986, Rules 9-201 and 9-202. As shown in the note to Rule 9-201, the district attorney must approve waiver of the filing fee. The information and indictment must both be signed by the district attorney. SCRA 1986, Rules 9-203 and 9-204. Prosecutorial immunity of an Assistant District Attorney comes at the initiation of the formal charges through information or indictment of any type. An investigative officer who files a false affidavit to secure an arrest warrant does not retain prosecutorial immunity. In fact, New Mexico, like many states, recognizes it is inappropriate for an attorney in a case to act as a witness. SCRA 1986, Rule 16-307.

The Tenth Circuit in this case, while stating it was following a functional test, in fact, did not. It held, if the proceeding involved a judicial matter by an employee of the District Attorney's Office, there was absolute immunity for that person.

This is an important issue for the Court. The Court must balance the rights of citizens to be free from false arrest and imprisonment and the important law enforcement functions of bringing to justice those who commit crimes. In determining that line, the prior functional test to view traditional immunity is appropriate. In applying that test, this Court should review its prior decisions and determine that immunity is not based upon the status of

being an employee for the District Attorney's Office. Rather, immunity is to be determined by the actions taken by the individual and the stage of the process in which that action is taken.

This case is important to clarify the rule of absolute immunity. An important goal in a fair society is to protect citizens from false arrest. A society cannot be free if its citizens are subject to false arrest and those making the false statements to secure the arrest have absolute immunity. Citizens of this country should be able to seek redress for false arrest. Mere dismissal is not proper redress. Congress has long ago determined that citizens have a right to be protected against constitutional abuses of state officers. Our system of law enforcement is only as good as the people who enforce it. If they make false statements to secure an arrest warrant, there must be an action to protect those wrongfully arrested.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN, LUTZ & BROWER, P.C.

WILLIAM L. LUTZ
Counsel of Record
HUGH T. BROWER
Attorneys for Petitioner
2100 N. Main, Ste. 3
P. O. Drawer 1837
Las Cruces, NM 88004
(505) 526-2449

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff-Appellant, v. CHARLES TIMOTHY KLING, Defendant-Appellee.	)	No. 95-2272 (Filed Jan. 6, 1997)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV-94-1318-LH)

Submitted on the briefs:

William L. Lutz and Hugh T. Brower of Martin, Lutz & Brower, P.C., Las Cruces, New Mexico, for Plaintiff-Appellant.

Mark D. Jarmie of Sharp, Jarmie, & Scholl P.A., Albuquerque, New Mexico, for Defendant-Appellee.

Before PORFILIO, ALARCON,* and LUCERO, Circuit Judges.

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* Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

PORFILIO, Circuit Judge.

I. INTRODUCTION

Plaintiff Susan Lynn Roberts appeals from the district court's grant of summary judgment to defendant on her civil rights complaint, filed pursuant to 42 U.S.C. § 1983. She challenges as legal error the district court's grant of absolute immunity, and alternatively, qualified immunity, to defendant. We have jurisdiction over this appeal under 28 U.S.C. § 1291.[1] Our review of the district court's summary judgment decision is de novo, applying the same legal standards as those employed by the district court to determine whether a genuine issue of material fact precludes summary judgment, and, if not, whether the moving party is entitled to judgment as a matter of law. *See Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995).

The underlying facts are undisputed. Defendant, then an investigator for the District Attorney's office in the Third Judicial District of New Mexico, investigated allegations that plaintiff had failed to return her children to the custody of their father in violation of a court order. Defendant subsequently signed and filed a criminal complaint against plaintiff before a magistrate in Dona Ana

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

County, New Mexico, and obtained a warrant for plaintiff's arrest. Plaintiff was arrested in Oregon and extradited to New Mexico for trial. Five months after her preliminary hearing, plaintiff moved to dismiss the charges against her on jurisdictional grounds. The state trial judge dismissed the case and his decision was affirmed on appeal. In her civil rights complaint against defendant, plaintiff contended, in relevant part, that defendant knowingly and willfully executed the criminal complaint based on false and misleading factual allegations, resulting in the issuance of a warrant for her arrest.[2]

Defendant contended he was immune from plaintiff's suit, and the district court agreed. The district court concluded that defendant was entitled to absolute prosecutorial immunity, holding that defendant's actions in swearing out a complaint and seeking an arrest warrant were "functionally initiating a criminal prosecution." Appellant's App. at 81. Further, the court held that defendant was also entitled to qualified immunity. *See id.* at 89.

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[2] Plaintiff also alleged in her complaint that defendant violated her constitutional rights by 1) providing false information to the Federal Bureau of Investigation, leading to a federal warrant for her arrest, 2) issuing publicity containing false statements about plaintiff, and 3) making false statements to the media. However, on appeal she does not challenge the district court's resolution of these allegations in defendant's favor. Accordingly, she has waived appellate review of those issues. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

II. ABSOLUTE IMMUNITY

A.

Absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). Under the "functional approach" adopted by the Supreme Court, " 'we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.' " *Spielman v. Hildebrand*, 873 F.2d 1377, 1381 (10th Cir. 1989) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). In other words, absolute immunity " 'is justified and defined by the functions it protects and serves, not by the person to whom it attaches.' " *Mee v. Ortega*, 967 F.2d 423, 425 (10th Cir. 1992) (quoting *Forrester*, 484 U.S. at 227).

In *Imbler v. Pachtman*, the Supreme Court held that state prosecutors are entitled to absolute immunity from § 1983 suits for activities within the scope of their prosecutorial duties. 424 U.S. at 420. The Supreme Court defined the activities deserving of immunity as those "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution and . . . presenting the State's case." *Id.* at 430-31. Similarly, this court has noted that the analysis of prosecutorial immunity is based on a continuum: "the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that

absolute immunity will attach." *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994) (further quotation omitted).

" 'Although identifying those acts entitled to absolute immunity is not always easy, the determinative factor is "advocacy" because that is the prosecutor's main function and the one most akin to his quasi-judicial role.' " *Spielman*, 873 F.2d at 1382 (quoting *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) and citing *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988)); *see Gagan*, 35 F.3d at 1475; *Pfeirffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1991). In contrast, when a prosecutor acts in an administrative or investigative capacity, those activities are entitled to qualified immunity only. *See England v. Hendricks*, 880 F.2d 281, 285 (10th Cir. 1989) (citing *Meade*, 841 F.2d at 1532).

The district court's decision that defendant is entitled to absolute immunity is a question of law which we review de novo. *See England*, 880 F.2d at 285. In this case, we think it is clear that defendant's actions in swearing out a complaint against plaintiff were prosecutorial in nature. He was initiating a judicial proceeding as part of the District Attorney's office.[3] *See Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir. 1990) (filing charges was act "within the continuum of initiating and presenting a criminal

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[3] We note that although defendant was employed as an investigator, under the functional approach, we focus on the nature of his actions in this case. Defendant need not be a prosecutor to be afforded prosecutorial immunity; the immunity extends to those who perform equivalent functions. *See Hill v. City of New York*, 45 F.3d 653, 660 (2d Cir. 1995) (employees of district attorney's office); *Pfeiffer*, 929 F.2d at 1489-90; *Meade*, 841 F.2d at 1532 n.18.

case"); *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983) ("filing a criminal complaint . . . was clearly an initiation of a prosecution").

B.

The Supreme Court has recognized that prosecutorial functions may also involve some activities preliminary to the initiation of an action, including actions away from the courtroom. *See Imbler*, 424 U.S. at 431 n.33. Because of their connection to the critical judicial role that a prosecutor plays, those activities are also afforded absolute immunity. *See Pfeiffer*, 929 F.2d at 1490 (immunity may attach to even administrative or investigative acts when necessary for a prosecutor to function as an officer of court).

The remaining question, then, is whether defendant's act of obtaining an arrest warrant was performed in his role as an advocate, *see England*, 880 F.2d at 285, or, in other words, whether his actions "constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity." *Spielman*, 873 F.2d at 1382. One factor, although not always dispositive, is whether the acts complained of were taken before or after a determination of probable cause. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274 & n.5 (1993). Although plaintiff contends that issues of fact exist as to the District Attorney's decision regarding probable cause, it is clear that the Chief Deputy District Attorney signed the complaint before defendant performed any of the acts complained

of.[4] The District Attorney's undisputed testimony was that, in signing the complaint, the Chief Deputy District Attorney was approving the complaint "as it relates to probable cause." Appellant's App. at 131. Because defendant's actions followed a probable cause determination, they are more closely associated with the judicial process and the prosecutorial function of an advocate for the state.

Additionally, "[w]e have held that a critical factor for absolute prosecutorial immunity 'involves a prosecutor's acts as an advocate before a neutral magistrate.' " *Snell*, 920 F.2d at 693 (quoting *Lerwill*, 712 F.2d at 437). Plaintiff does not challenge defendant's investigation of the facts, only his conduct before the magistrate. In *Burns v. Reed*, 500 U.S. 478, 491-92 (1991), the Supreme Court held that a prosecutor's appearance and presentation of evidence before a judge to secure a search warrant was entitled to absolute immunity, concluding that the prosecutor was acting as advocate for the state and that immunity would serve the policy of protecting the " 'judicial phase of the criminal process.' " *Id.* at 492 (quoting *Imbler*, 424 U.S. at 430). Similarly, defendant's seeking an arrest warrant before a magistrate is associated with the judicial process.

Finally, the act of obtaining an arrest warrant in conjunction with the filing of a criminal complaint is

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[4] Defendant signed the criminal complaint as the complainant, and the Chief Deputy District Attorney signed in the "Approved" section, to indicate approval by the District Attorney's office. Appellant's App. at 145.

functionally part of the initiation of a criminal proceeding, and therefore prosecutorial in nature. As this court stated in *Lerwill v. Joslin*:

> [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of Imbler. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under Imbler.

712 F.2d at 437-38.

This court has held that "a prosecutor's absolute immunity has extended to his procurement of an arrest warrant." *Lerwill*, 712 F.2d at 437.[5] We conclude that

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[5] The Ninth Circuit has recently called *Lerwill* into question, noting that it was issued before current Supreme Court authority on the subject of prosecutorial immunity. *See Fletcher v. Kalina*, 93 F.3d 653, 656 n.3 (9th Cir. 1996). Other circuits continue to cite *Lerwill* as authority for the proposition that, in seeking an arrest warrant in connection with filing charges against a defendant, a prosecutor is functioning as an advocate for the state and is entitled to absolute immunity. *See Pinaud v. Suffolk*, 52 F.3d 1139, 1150 (2d Cir. 1995); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986). *See also Schrob v. Catterson*, 948 F.2d 1402, 1414 (3d Cir. 1991) (noting split of authority regarding absolute immunity "in the context of the prosecutorial decision to seek an arrest or search warrant,"). We reaffirm our position in *Lerwill* because, as discussed below, we conclude it is consistent with the more recent Supreme Court pronouncements.

defendant is entitled to absolute immunity for seeking an arrest warrant in connection with the charges being filed against plaintiff under the auspices of the District Attorney's office. It is clear from the record on appeal that the purpose of the warrant was to secure plaintiff's presence to defend against the criminal charges and, as a by-product, to find the children who had not been returned to their father. The warrant was not investigative or used as the means to find more information before deciding that the case should be prosecuted, but was sought at the same time the charges against plaintiff were filed. *See also Snell*, 920 F.2d at 693 ("a prosecutor who performs functions within the continuum of initiating and presenting a criminal case, such as . . . seeking an arrest warrant . . . ordinarily will be entitled to absolute immunity"); *Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (defendant properly claimed absolute immunity with regard to drafting and authorizing original criminal complaint and procuring arrest warrant).

C.

On appeal, as before the district court, plaintiff contends that the Supreme Court's opinion in *Malley v. Briggs*, 475 U.S. 335 (1986) is dispositive here. In *Malley*, the Supreme Court denied absolute immunity to a police officer who sought an arrest warrant following his investigation of the defendants. Plaintiff here asserts that, defendant, a certified law enforcement officer, should be denied absolute immunity because his acts were the same as those of the police officer in *Malley*.

We disagree. First, defendant's status as a certified law enforcement officer is irrelevant to the determination of whether his actions are entitled to immunity, under the functional approach.[6] Second, while defendant's acts in swearing out a complaint and obtaining a warrant for plaintiff's arrest are closely similar to the acts which afforded the defendant only qualified immunity in *Malley*, the acts themselves are not the focus of the functional approach. Instead, we examine the function a defendant's acts serve. *See Imbler*, 424 U.S. at 430 (approving Court of Appeals' focus on "the functional nature of the activities"); *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987) (looking to "the nature or function of the ultimate act" in determining entitlement to prosecutorial immunity); *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987) (analyzing immunity on "functional basis").

We are mindful of case law reasoning that different actors performing the same acts should receive the same level of immunity. *See, e.g., Fletcher*, 93 F.3d at 655-56. Nonetheless, we think that the proper focus is on the function an act serves, not the act itself. Further, we think

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[6] Plaintiff contends on appeal that the district court ignored the functional test when, in distinguishing *Malley* from the present case, it commented that defendant was not a police officer. Then, in an interesting reverse, plaintiff appears to argue that defendant's status as a certified law enforcement officer is a factor in favor of applying *Malley*. Appellant's Br. at 19. We think plaintiff's argument misses the mark. Here, the district court noted that plaintiff "was not a police officer capable of depriving people of valuable rights," but worked directly for the district attorney. The court then summarized defendant's actions in this case. The court's analysis clearly did not ignore the functional approach, but applied it.

Supreme Court authority supports this analysis. In *Buckley*, the Court's opinion indicates that the act of interviewing witnesses may or may not be entitled to absolute immunity, depending on the role of the actor: "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause." 509 U.S. at 273.[7] In *Malley* itself, the Supreme Court recognized the distinction between function and conduct, finding unpersuasive the proposed analogy between a police office seeking an arrest warrant and a prosecutor seeking an indictment. 475 U.S. at 342-44. The policy considerations underlying a grant of immunity focus on the function or role an individual fulfills in performing certain acts, not on the acts alone. "We have

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[7] A majority of cases applying the same act/same immunity analysis cite to *Buckley* as authority. *See, e.g., Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 30 (1st Cir. 1995); *Giuffre v. Bissell*, 31 F.3d 1241, 1252 (3d Cir. 1994). In *Buckley*, the Court, quoting the Seventh Circuit, used "same act" language in a discussion of the various functions that a prosecutor performs. 509 U.S. at 273. However, the opinion as a whole reflects an emphasis on function, not conduct alone. Other cases cite to the Supreme Court's opinion in *Burns* as support for this kind of analysis, *see Schrob*, 948 F.2d at 1415 n.12. However, the *Burns* court did not compare like acts in its analysis. The Court noted: "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for *following the advice*." 500 U.S. at 494 (emphasis added). The opinion goes on to reject arguments that the act of giving advice to the police was part of the prosecutorial capacity or closely associated with the judicial process. *Id.* at 495-96. We conclude that neither *Buckley* nor *Burns* is contrary to our reasoning here.

interpreted § 1983 to give absolute immunity to functions 'intimately associated with the judicial phase of the criminal process,' not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley*, 475 U.S. at 342 (quoting *Imbler*, 424 U.S. at 430).

III. SUMMARY JUDGMENT

Plaintiff also contends that the district court erred when it ignored genuine issues of material fact which preclude summary judgment on the basis of absolute immunity. She takes issue with the district court's statements that the District Attorney had concluded that probable cause existed to believe plaintiff had violated the applicable statute and that a criminal complaint should be filed. To support her contention that these matters are genuinely disputed, she cites to the District Attorney's deposition. She contends that he testified he did not make a determination that probable cause existed, but determined only that defendant should investigate further, and he did not instruct defendant to obtain a warrant for plaintiff's arrest. Therefore, she argues, there is factual dispute "as to whether [defendant] was functionally initiating a criminal prosecution." Appellant's Br. at 21.

A careful review of the deposition testimony leads us to conclude that plaintiff's arguments on this point have no merit. The District Attorney did, indeed, state that he sent defendant to investigate whether probable cause existed as to each essential element, *see* Appellant's App.

at 131, 138, and that he had not authorized the filing of a criminal complaint before defendant investigated the relevant facts, *see id.* at 133. However, he also testified that if defendant's investigation corroborated the facts as preliminarily reported, then there was probable cause to believe a crime had been committed. *See id.* at 140. Specifically, he said: "In speaking with [defendant], I instructed him to do the investigation, sign whatever his investigation revealed, and if they were consistent with what information was given to me [ ], that would be probable cause to go forward." *Id.* He also testified that the information in the Statement of Facts prepared by defendant was consistent with the information as preliminarily reported, and that the Chief Deputy District Attorney, "in signing the criminal complaint, determined, based on his own experience, that there were sufficient facts alleged to constitute probable cause to file a criminal complaint." *Id.*

While the District Attorney did not make an actual probable cause determination before defendant's investigation, once the reported facts were verified by defendant's investigation, both he and the Chief Deputy District Attorney believed that probable cause existed to go forward with a criminal complaint. Therefore it is undisputed that defendant's actions in seeking an arrest warrant and swearing out a complaint followed a determination of probable cause within the District Attorney's office.

IV. CONCLUSION

Because we conclude that defendant is entitled to absolute prosecutorial immunity under the facts of this case, we need not address plaintiff's arguments regarding the district court's alternative holding that defendant would be entitled to qualified immunity. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff - Appellant, v. CHARLES TIMOTHY KLING, Defendant - Appellee.	)))))))	No. 95-2272 (D.C. No. CIV-94-1318-LH)

JUDGMENT
Entered January 6, 1997

Before PORFILIO, ALARCON,* and LUCERO, Circuit Judges.

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*Honorable Arthur L. Alarcon, Senior circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ Audry F. Weigel
Deputy Clerk

(SEAL)
CERTIFIED a True Copy of
the original filed in my office.
Robert M. March, Clerk

by /s/ Rebecca Chavez Lutz
Deputy